April 26, 2005

Morning Business Speakers:
Senator Bunning

Noteworthy:
"The principle of a fair up or down votes on judicial nominees is the fundamental discussion here. My goal is to treat these nominees fairly, with respect and with courtesy… We can accomplish that without the Constitutional option, show restraint, bring judges to the floor, have debate, discuss, and then vote."
-Senate Majority Leader Bill Frist, Dug Out, 4/26/05

Double Standard?
"Vile things have been said about Justice Souter. And vile things have been said about Justice Kennedy."
-Senator Harry Reid, Senate Floor, 4/26/05

"I think that he has been an embarrassment to the Supreme Court. I think that his opinions are poorly written. I don't--I just don't think that he's done a good job as a Supreme Court justice."
-Senator Harry Reid, Meet The Press, NBC, 12/5/04

Transcript:

Senator McConnell 4/25/05, PBS, News Hour

Floor Statement of Senator Jim Bunning
April 26, 2005

Mr. President, I rise to talk about the broken confirmation process for federal judges.

The Senate faces an unprecedented crisis and is failing the Constitution and the American people. For the first time in the Senate's history, a minority of Senators are

twisting the rules of the Senate to block the will of the majority. They are taking for themselves a power granted solely to the President – the power of nominating judges. And just as disturbing is the fact that the minority is also threatening to shut down the Senate and the people's business if the majority acts to restore Senate tradition and fulfill our constitutional responsibilities.

Make no mistake about it – we will restore the Senate tradition of taking up-or-down votes on the President's nominees. Hopefully, the minority will support the nomination process that the Senate has practiced for more than 200 years and end the filibustering of judicial nominees. But if the majority of the Senate must act to restore that tradition, we will do so.

Like many Senators, I spend a lot of time in my home state. I meet with constituents, give speeches to civic groups, and tour manufacturing plants. I hear a lot about the war in Iraq. Social Security. People talk about gas prices and the economy, education and health care. But the topic I hear most about is the importance of confirming judges.

Last November, Election Day came and the American people spoke. President Bush won re-election by receiving the most votes ever cast for a presidential candidate. The majority of the American people clearly endorsed his policies and leadership.

So when this Congress convened, I had high hopes that the crisis of judicial nominations was behind us. I hoped the Senators who obstructed the Senate's business over the past two years realized the errors of their ways. After all, they lost seats in the Senate and their Minority Leader in the last election.

I hoped we could turn to voting on President Bush's nominations to the Federal bench. I hoped we would return to the Senate's tradition of giving nominees an up-or-down vote. But it did not take long to realize that was not going to be the case.

The minority proudly boasts about their filibustering the president's nominees. And if the majority acts to restore Senate tradition, they say they are going to expand their obstruction to the entire business of the Senate and shut down the government.

In Article II, Section 2, of the Constitution, the President is given the power to nominate judges. And upon the "Advice and Consent" of the Senate, those nominees shall be placed on the bench. So the president alone has the power to pick judges. And the Senate has the responsibility to render its advice and consent.

That leads to the question of what does advice and consent mean. Fortunately I am not a lawyer or a constitutional scholar - but I can read. And the Framers were pretty clear when they spoke. First, they said the Senate as a whole is to give its advice and consent. When the Constitution speaks of the Senate as a whole body, it means a majority of the body. The Supreme Court has even stated as much.

Second, the Framers were pretty clear when they required more than a majority to act. For example, they required a two-thirds vote to amend the Constitution. They required a two-thirds vote to convict and remove from office an impeached President or Federal official. But even more telling, in the very same sentence of the Constitution that gives the Senate the duty to render advice and consent on nominations, the Framers also required a two-thirds vote to approve a treaty. Now if the Framers meant that a super-majority vote was required to approve a nominee, then they would have clearly stated so.

The super-majority is something the Constitution rejects for nominees, but that is exactly what the minority is saying when they filibuster a nominee. The minority is attempting to shift the balance of power away from the Executive and to the Legislative Branch. That is nothing more than a rewrite of the Constitution and the separation of powers the Framers designed more than 200 years ago.

What the Constitution does give every Senator a right to do is to express his or her opinion on a nominee and on the nominee's qualifications. That right is to speak in support or opposition, and vote for or against the nominee.

But no Senator has the right to prevent the whole Senate from voting on judicial nominees if they are unable to convince enough Senators to join in their opposition. It is the duty of Senators to speak their objections, and then vote – yes or no. They may make the ultimate statement against a nominee by voting against him or her, but they may not prevent the rest of the Senate from giving that same ultimate statement. They must not block an up-or-down vote on the nominee.

In fact, for more than 200 years this is how the senate has considered nominations – with an up or down vote. Debate has taken place and then the nominee has been given a vote. Never before the 108th Congress was a nominee with majority support denied a vote on the Senate floor. Never before the last Congress have the rules of the Senate been twisted to prevent such a vote.

Previous Senates have not even considered filibustering nominees an option. The rules do not explicitly prohibit it because Senate tradition has always been to allow the nominee, no matter how controversial, an up-or-down vote.

I remember a situation in the 106th Congress, a group of Republicans opposed several of President Clinton's nominees to the 9th Circuit. Some Senators wanted to do everything within their power to stop those nominees from reaching the bench. But the Majority Leader at the time, Senator Lott, said this was wrong and filed cloture himself to move the nominations forward. Cloture was invoked and both nominees were confirmed, with many more Senators opposing the nomination than cloture.

Today, President Bush's nominees – who all have majority support – are being denied a vote by a partisan filibuster led by the Democrat party leadership. That is unprecedented and must come to an end.

Just years ago, many Senators who now champion the filibuster of President Bush's nominees stated that judicial nominees should receive an up-or-down vote. Some even advocated abolishing the filibuster altogether. In fact, nine members of the minority who are still serving today voted to abolish all filibusters. And now some of those Senators are the loudest voices in the Senate for filibustering President Bush's nominees.

And some of my colleagues across the aisle have spoken out against filibustering judicial nominees. For example, the Senior Senator from New York said in 2000, that "we are charged with voting on the nominees."

The junior Senator from California said in 1997 "It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor."

The current Minority Whip said in 1998 that "If, after 150 days languishing on the Executive Calendar that name has not been called for a vote, it should be. Vote the person up or down."

And, the senior Senator from Massachusetts said in 1998 that "we should resolve these disagreements by voting on these nominees – yes or no."

Mr. President, it is amazing how some easily forget their own words. Or maybe I should say, conveniently and selectively forget their own words.

Well, Mr. President, Republicans did give president Clinton's nominees an up or down vote. And the now the minority should allow the same courtesy to President Bush's nominees.

Something we have heard over and over again from the minority is how many of President Bush's nominees they have allowed to be confirmed. Well, let's talk about that. The minority likes to talk about all nominations. But all nominations are not equal in their impact within the judiciary. District Court judges, while they are important, are not as powerful as Circuit Court judges.

President Bush's nominees to the Circuit Courts have the lowest confirmation rate since the Roosevelt administration at 69%. President Clinton's Circuit Court nominees were confirmed at a rate of 77%, far above President Bush. And not all Circuit Courts are equal. The DC Circuit is the most important, and for that court, only 33% of President Bush's nominees have been confirmed. President Clinton's nominees were confirmed 78% of the time. Those differences are staggering and they support the fact that our judicial confirmation system is broken because of the obstruction tactics by the minority.

Something must be done to fix this crisis. And the solution can be up to our colleagues on the other side of the aisle. The simplest, fastest, and most desirable option

is for the minority to agree to drop its obstructionist ways and allow up-or-down votes on all judicial nominees.

Unfortunately, that does not appear likely to happen. Last Congress, the current Minority Leader was asked how much time his side needed to present their case against a nominee. He replied that there was "not a number in the universe" that they would accept.

So where does that leave us? The only answer I can see is to restore Senate tradition through a change in the rules of the Senate. Article I, Section 5, of the Constitution reads, "each house may determine the rules of its proceedings." That means a majority of the Senate can act to change the rules.

It is the responsibility of the majority of Senators who want to fulfill the Senate's constitutional duty to take actions necessary to do so. Majority action to set the rules of the Senate is not unprecedented, nor is it an assault on the body. It cannot be an attack on the Senate to act to restore 200 plus years of Senate tradition and allow the Senate to fulfill its constitutional obligations.

The senior member of the Senate's Democrat caucus himself has taken such action. Not once or twice, but four times in a 10 year period, the senior Senator from West Virginia changed the application of Senate rules through a majority vote. And all four times his actions were aimed at limiting Senators' right to debate or filibuster. The Senate's history is filled with other examples of majority action resulting in a change to the Senate's rules to restrict the filibuster.

Let me make something very clear, we are not talking about changing the legislative filibuster. In fact, the only Senators that I have heard of advocating elimination of the legislative filibuster are on the other side of the aisle.

Not only does the legislative filibuster have a place in Senate tradition and history, it is fundamentally different from the filibuster of judicial nominees. Writing legislation is solely within the powers of the legislative branch, and the Senate is empowered by the Constitution to set its own rules. In the case of nominations, the nominating power is the President's, and the Senate can only accept or reject those nominees. The purpose of a legislative filibuster is to force changes in legislation. However, no number of Senators can amend nominations – we can only accept or reject them. There is a place for the legislative filibuster within the Constitution, but there is not for the filibuster of nominations.

So Mr. President, I urge my colleagues on the other side of the aisle to take a deep breath and step back from the line in the sand they have drawn. Offer us a compromise that guarantees each nominee a vote. Give us a set time for debate. Let's take a vote.

This issue is too important for the majority of the Senate to ignore anymore. We cannot and will not let a minority of this body rewrite the Constitution and destroy Senate tradition. We must vote and we will vote.

Mr. President, I yield the floor.

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Senator McConnell 4/25/05, PBS, News Hour

IFILL: senate leaders are counting votes and devising strategy for this latest culture clash over judicial nominations. here to lay that out are two members of the judiciary committee: senator jon kyl of arizona is the chairman of the republican policy committee; and democratic senator richard durbin of illinois is the assistant minority leader. welcome, gentlemen. senator durbin, it seems that what is normally an arcane dispute over senate rules has suddenly turned the corner into kind of a cultural war. how did that happen?

SENATOR RICHARD DURBIN: it's an interesting thing, because when this first got started i thought the american people won't even understand the debate; the use of terms like ""filibuster"" and the rules of the senate. who pays any attention? but it's amazing that it's caught on. i think that's why it's moved into this new phase in opposition. people across the country understand what it means to change the rules in the middle of the game, which is what the nuclear option would do. it would eliminate the filibuster on judicial nominees, a tradition of the senate that's been here for over 200 years. it also is going to assault a very fundamental principle of checks and balances, which gives to the senate the last word when it comes to advice and consent of judicial nominees and presidential appointments. but i think the thing that really comes home is the fact that the president has successfully brought through congress-- a congress the senate, i should say, of democrats and republicans-- over 95% of his nominees. he's been extremely successful but he wants them all. he wants more power. it's not just the power to govern, it's the power to rule.

IFILL: senator kyl, what senator durbin just said, that this is a big turn and all of a sudden this was changing the rules in the middle of the game, what's your sense of that?

SENATOR JON KYL: well, exactly the opposite. for 214 years it has been the tradition of the senate to approve judicial nominees by a majority vote. many of our judges and, for example, clarence thomas, people might recall, was approved by either 51 or 52 votes, as i recall. it has never been the rule that a candidate for judgeship that had majority support was denied the ability to be confirmed once before the senate. it has never happened before. so we're not changing the rules in the middle of the game. we're restoring the 214-year tradition of the senate because in the last two years democrats have begun to use this filibuster. that goes to the statistics that my friend dick durbin just cited. if you take all of the district court judges and put them into the mix, president bush has about the same number approved as any other president. but if you focus on the judges directly below the supreme court, the circuit judges, one- third of them roughly have been filibustered or under threat of filibuster-- 16 out of 51, which resulted in president bush having the lowest confirmation rate of circuit court judges of any president in modern history.

IFILL: senator kyl, we've heard this argument a lot about judgeships. i wonder how this one became a religious debate. that event we saw last night was a church. they were speaking in apocalyptic terms about the end of democracy as we know it. do you see this as a cultural issue?

SEN. KYL: it's not a religious debate at all. i know some in the media have portrayed it as such. i think democrats and republicans are talking to all kinds of folks. i know because senator durbin and i have both discussed this in the judiciary committee that neither of us believe that there should be any religious litmus test. this isn't about religion at all. this is strictly about whether or not a minority of senators is going to prevent the president from being able to name and get confirmed judges that he chooses after he's been elected by the american people. it's never been the case until the last two years that a minority could dictate to the majority what they could do.

IFILL: what was last night about?

SEN. KYL: last night was the majority leader speaking to a group of people just like senators speak to groups of constituents all over the country. if there won't be a religious test i wouldn't think you should suggest that senators shouldn't talk to religious people as well as non-religion people.

SEN. DURBIN: i respect jon kyl. we work together on a lot of issues. i have to disagree. unfortunately senator Frist's appearance last night at this kentucky rally by videotape just added fuel to the flame that this is somehow a religious debate. it is a constitutional debate that constitution prohibits us from even asking a nominee whether they have a religious persuasion. there is no religious test in america. so now because they can't win the constitutional argument or the traditions of the senate, many of the critics, those who support the nuclear option and critics of the current rules, are saying it's all about this nominee's religion. that is not the fact in any way whatsoever. trust me, out of the 205 judges which president bush has had successfully approved by the senate, there are many with political views different from my own, and not a single one that i can tell you of their religion, what their religious persuasion might be. it is a sad time when the majority leader of the senate adds his voice to this divisive rally which occurred in kentucky. we have so many things that divide us as americans. we don't need to allow religion to become part of this debate.

IFILL: at what point do democrats begin to overreach the debate like this by threatening basically to shut down the senate?

SEN. DURBIN: we're not going to shut down the senate. we're not going to shut down the government. i can tell you we learned our lesson watching newt gingrich. that hapless tactic was terrible; it's not going to happen again. i will tell you this: if they decide on the republican side to break the rules in order to change the rules, then sadly we have no choice but to enforce the rules and live by them. it will be a different senate. senators will be at their desks more, on the floor more, in session more. the key legislation for the defense of america and our troops and important appropriations bills will still pass, but the agenda of the senate and the procedure of the senate will change.

IFILL: senator kyl, before we move on to what the procedure will be on the floor in the next couple of weeks, one more question about last night. james dobson, who is the head of a group called focus on the family, one of the organizers of last night's event, along with the family research council, criticized the supreme court directly. he described them as ""arrogant, imperial and out of control."" do you agree with that?

SEN. KYL: as a member of the bar, it's not my inclination to criticize justices by name or even decisions that they've rendered except on the merits. i don't agree with all the decisions of the supreme court. but it is wrong to believe that because people of faith happen to disagree with pronouncements of the supreme court and choose to call some of those decisions ""arrogant"" to therefore suggest that they don't have a part to play in the national debate. let's not get focused on that issue. it has nothing to do with the rules of the senate and changing 214 years of tradition here in the united states senate.

SEN. KYL: that's following a tangent that's really not relevant to the debate that we're going to be focused on here.

IFILL: let's talk about what senator durbin just outlined in which the democrats would allow debate only on the issues which they cared about, and close off debate on anything else. what do you think about that approach?

SEN. KYL: well, i don't think it's productive obviously. it kind of reminds me of the school yard bully. when the umpire makes a call against him, he picks up his ball and goes away. i don't think the american people will really appreciate that. we've got important business, not just national security business, but the bill we're on right now to fund the troops' war effort and get a budget this week, the highway bill that's before us this week. those are important things that i think a lot of people would like to get done. but what my colleague is talking about is using, among other things, the legislative filibuster. that's not going to go away. senators want their right to filibuster. they'll have it. what would occur as a result of the question that will be asked to the presiding officer in this debate is basically: is it the tradition of the senate to have an up or down vote to give these nominees an up or down vote with the majority vote prevailing, or is the last two years the real precedent of the senate to require 60 votes? i think that the presiding officer will say no. the tradition of the senate has been that a majority vote prevails.

IFILL: does senator Frist have the votes in order to force this nuclear option...

SEN. KYL: well, i'm not going to characterize it as a nuclear option. that's...

IFILL: ...or a constitutional option? whatever term we're using.

SEN. KYL: it is a constitutional option because the senate has the right to provide its own precedents. that's what would be done. i won't predict vote, but i don't think we'd go forward unless we thought we had the votes.

IFILL: what's your nose count these days.

SEN. DURBIN: i can tell you it's very close, down to one or two republican senators. they understand the basics. first, this term ""nuclear option"" was coined by trent lott, a republican. it's not a democratic way to try to color this debate. but secondly, we've had 11 different filibusters on judicial nominees, and senator Frist himself voted to filibuster one of president clinton's nominees, richard piaz, appointed to the ninth circuit. you can find it in the congressional record. he voted that way. it's happened despite what you hear to the contrary. they are changing the rules and traditions of the senate. many republicans like john mccain, my colleague, jon kyl's colleague, from arizona has said this is the wrong thing to do. they realize that changing the rules and assaulting this constitutional tradition may sound great today when you have the majority. but over the long haul, it is not good for the senate or good for our country.

SEN. KYL: there has never been a successful filibuster of a nominee that had majority support in the history of the united states senate. the incident that was mentioned by senator durbin was a situation in which trent lott, the then-majority leader, worked with tom daschle, the then- minority leader, to be sure that two controversial choices of president clinton got a vote up or down on the senate floor. we voted to allow them to have a vote. i voted for one of the candidates, and i voted against one of the candidates. that's what we ought to allow here is an up or down vote. we didn't stop those candidates from being voted on. they're sitting on the ninth circuit court of appeals right now.

IFILL: senator durbin also alluded to your seat mate, senator mccain. in last night's event they targeted what they described as ""squishy republicans,"" not only senator mccain, but they named senator lugar and senator murkowski as people who everyone should call and get onboard. is that sort of conversation going on within the republican caucus as well?

SEN. KYL: i think democrats are talking to republicans; republicans are talking to each other. we do that all the time. there's nothing untoward about that. i honestly don't know how any republican is going to vote as we sit here this evening.

IFILL: senator durbin, do you think there should be in the end after this process has sorted itself out some sort of effort for legislative overview of judicial decisions?

SEN. DURBIN: no, i think we ought to be very careful here. the suggestion from mr. perkins of this family research council, that they're going to close down certain circuits of the federal judiciary is the kind of threat that they should take seriously. we have always valued an independent judiciary. and for any group-- democrat, republican, religious or not religious-- to say that they are going to go after the judiciary, as mr. delay has said in the house, is just wrong; it is something we shouldn't encourage. i've been one who has dispute add lot of decisions in the judiciary over the years. i'm sure senator kyl has, too. but the idea of trying to remove the judge who makes the unpopular decision or to close down the circuit, that just goes way too far. that is extreme.

IFILL: senator kyl, your response.

SEN. KYL: i'll tell you what is shutting down the judiciary, is not filling vacancies. we have, according to the commission on the courts, several emergency... judicial emergencies, situations in which we need to put judges in to vacant positions. and we're not being able to act on them. it really is true that justice delayed is justice denied. so we need to give these judges an up or down vote. that's all we're asking for.

SEN. KYL: if some of my colleagues think that they're too conservative or in some other way unqualified, then vote against them.

IFILL: should there be legislative oversight over individual judicial decisions?

SEN. KYL: i don't think the constitution allows us judicial oversight over individual decisions. our authority under the constitution is to define the jurisdiction of certain of the courts. that's really the only thing i think that constitutionally we can do. now, i mean, obviously we could change federal laws that the court has made pronouncements on.

IFILL: senator kyl, senator durbin, thank you both very much.